

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

CHRISTOPHER S. HOSKINS et al.,

Plaintiffs and Respondents,

v.

JIM HOGSTAD et al.,

Defendants and Appellants.

C049379

(Super. Ct. No.
04AS04242)

APPEAL from an order of the Superior Court of Sacramento County, Thomas M. Cecil, Judge. Affirmed.

Gerald D. Langle, for Plaintiffs and Respondents.

Boutin Dentino Gibson DiGiusto Hodell, Chris Gibson and Daniel S. Stouder, for Defendants and Appellants.

Defendants Jim Hogstad and Mike Maurice, Sr., (defendants) appeal the trial court's order denying their motion to strike the complaint under Code of Civil Procedure¹ section 425.16. The motion to strike was denied because the hearing date for that motion was not set within 30 days of service of the motion. We conclude the trial court did not abuse its discretion in denying

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

this motion because defendants failed to demonstrate that the docket conditions of the court precluded an early calendar date. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Christopher and Talahi Hoskins (collectively the Hoskins) and defendants are neighbors. A dispute has arisen between them based on defendants' claims that the Hoskins have been violating zoning laws. The Hoskins alleged that defendants have spied on them, taken photographs of people coming to and from their home, confronted them and their family members, falsely accused them of violating local laws and ordinances, and filed false reports with the City of Citrus Heights about these activities.

On October 20, 2004, the Hoskins filed a complaint against defendants alleging causes of action for an injunction, infliction of emotional distress, interference with quiet enjoyment, and negligent infliction of emotional distress.

On October 20, 2004, the Hoskins also filed a motion for a preliminary injunction that was scheduled for a hearing on November 19, 2004. That hearing was continued to November 30, 2004, and the trial court denied the motion on that date.

Meanwhile, on November 24, 2004, defendants filed a motion to strike the complaint under section 425.16 asserting that the complaint arose from defendants' actions that were in furtherance of their constitutional rights to petition the government and engage in free speech. The notice of motion identified the hearing date as January 31, 2005, and stated this

was "the first date available on the court's docket." No evidence regarding the court's calendar accompanied this motion.

In opposition to the motion, the Hoskins argued that the motion was improper because it failed to comply with section 425.16, subdivision (f), which requires that the hearing date for the motion be set "not more than 30 days after the service of the motion, unless the docket conditions of the court require a later hearing."

In their reply, the Hodstads argued that their attorney's paralegal had contacted the court and was notified by the clerk that the first available hearing date was January 31, 2005. They, however, failed to include any additional evidence on this point.

In its tentative ruling, the trial court denied the motion on the merits.

On the day of the hearing on the motion, defendants submitted declarations from their attorney and his paralegal. The paralegal said that on November 23, 2004, she called the Sacramento Superior Court calendar clerk to set the hearing date for the motion.² She told the clerk that the motion needed to be set on or before December 24. The clerk informed the paralegal that she would not put the "matter on calendar within 30 days

² While the court would have acted well within its discretion had it chosen to ignore these two declarations, the court's minute order does not indicate it exercised this discretion, so we shall consider this evidence as well. (Cal. Rules of Court, rule 317(d).)

due to the court's unavailability." Rather, the clerk set the motion on the court's first available date, January 31, 2005.

Counsel for defendants declared his clients' responsive pleading was due November 24, 2004 -- the day they filed the instant motion. Counsel specifically stated that he did not file an ex parte motion seeking to advance the hearing date because the court's local rules expressly provide that hearing dates must be reserved by calling the court and his paralegal informed him that the clerk told him the first available date for this hearing was January 31, 2005.

After taking the matter under submission, the trial court ruled defendants' "motion to strike complaint pursuant to CCP section 425.16 is denied as untimely. The motion was noticed for hearing more than 30 days after service, and defendants have not shown that docket conditions precluded an earlier calendar date." The defendants appeal.

DISCUSSION

The defendants argue the "trial court should have considered [their] motion to strike on the merits, because [they] noticed the motion for hearing on the Court's first available date." We reject this argument.

A

Standard Of Review

We review the merits of a court's order on motions to strike under section 425.16 de novo. (*Brenton v. Metabolife Intern., Inc.* (2004) 116 Cal.App.4th 679, 684.)

However, the particular question involved here -- whether the docket conditions of the court required a hearing more than 30 days after the service of the motion -- is a question of fact for the trial court's examination in the first instance. This fact is peculiarly within the knowledge of the trial court. As a result, the more deferential standard of review of abuse of discretion is appropriate. (See *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 593 [ruling on request for discovery in § 425.16 motion to strike reviewed for an abuse of discretion]; *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1247-1248 [rulings on discovery and attorney fees award reviewed under abuse of discretion standard]; *Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 127-129 [court's ruling on request for continuance in summary judgment motion reviewed for abuse of discretion].)

B

*The Trial Court Did Not Abuse Its Discretion In
Concluding Its Docket Did Not Require A Hearing Date
More Than 30 Days After Service Of The Instant Motion*

Turning to the merits of defendants' claims, we conclude the trial court did not abuse its discretion.

Section 425.16, subdivision (f) states, "The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than

30 days after service unless the docket conditions of the court require a later hearing."

The impact of this section was first addressed in *Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382. There, the defendants' attorney called the court clerk and set the motion for a hearing date that was more than 30 days after service of the motion. (*Id.* at p. 1387.) In a declaration in support of the motion, defendants' counsel explained that several dates were given on which the court could hear the motion, and counsel "coordinated said dates with the dates of availability of all Defendants. [The date chosen] was [the] earliest option under the circumstances." (*Ibid.*) The *Decker* court affirmed the denial of this motion because it was untimely. (*Id.* at p. 1390.) The court concluded that the 30-day time limit between service and the hearing date is jurisdictional. (*Id.* at p. 1389.) If the party setting the date beyond the 30-day window does not establish that the docket conditions of the court required that hearing date, the trial court must deny the motion. (*Id.* at p. 1390.) The appellate court concluded that the defendants' attorney's declaration did not establish that the date chosen for the hearing was required by the docket conditions of the court, but rather was chosen for the convenience of the parties. (*Id.* at p. 1388.)

We reviewed this issue in *Fair Political Practices Com. v. American Civil Rights Coalition, Inc.* (2004) 121 Cal.App.4th 1171 (FPPC). In that case, the defendants also failed to set the hearing within 30 days of service and the trial court denied

the motion as untimely. (*Id.* at pp. 1173-1174.) Defendants' counsel's paralegal submitted a declaration that stated the clerk informed her they were setting hearing dates more than 30 days beyond the service date and she sought "the earliest available date, consistent with [defendants' counsel's] out-of-office schedule calendar. The clerk offered the date . . . and we immediately noticed that date for hearing." (*Id.* at p. 1174.) We concluded that this declaration was vague and ambiguous and failed to demonstrate that the later hearing date chosen by counsel for the motion was based on the court's availability. (*Id.* at p. 1175.) Rather, it appeared the hearing date was set at trial counsel's convenience. (*Id.* at p. 1176.) As a result, the defendant failed to establish that the docket conditions of the court required a later hearing date and the trial court properly denied the motion. (*Id.* at pp. 1175-1176.) We further pointed out, "Two additional reasons support the trial court's denial of the anti-SLAPP motion: (1) as the trial court noted, defendants could have obtained a hearing within the statutory period simply by asking the court for a hearing by ex parte motion and (2) defendant could have waited to serve the motion until less than 30 days before the scheduled hearing." (*Id.* at p. 1176.)

Here, defendants' attorney's legal assistant called the court and obtained a hearing date from the trial court which an unnamed clerk stated was the first date available. The defendants then filed and served their motion on November 24, 2004, for a January 31, 2005, hearing date. They ignored the

instructions of *FPPC, supra*, 121 Cal.App.4th 1171 by failing to request an earlier date by ex parte application. They further failed to wait and serve the motion on January 2 so that it was served less than 30 days prior to the hearing date they were assigned. Thus, they violated the express 30-day time limit. Based on its familiarity of its docket conditions, the trial court concluded its docket would not have precluded an earlier hearing date. The defendants have failed to meet their burden of establishing that the trial court's ruling that this motion was untimely is "'an arbitrary, capricious, or patently absurd determination.'" [Citation.]" (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 301.)

The defendants contend they could "not delay serving the motion" to meet the hearing date because the court would not hear their motion after they answered the complaint and they would be subject to the burden of responding to discovery from the Hoskins. We disagree.

First, defendants could have reserved the hearing date earlier than the day before they filed the motion. An earlier request would have likely provided them with an earlier hearing date and possibly one within 30 days of November 24, 2004, the date their responsive pleading was due.

Second, after it was apparent that the hearing date offered by the clerk was more than 30 days away, defendants could have served their answer, filed their motion, and waited to serve the motion until 30 days prior to that hearing date. (*FPPC, supra*, 121 Cal.App.4th at p. 1177; California Rules of Court, rule

317(c) [proof of service must be filed no later than five days prior to hearing date].)

The defendants cite *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913, and assert it stands for the proposition that a trial court should not consider a motion to strike after the defendant has answered. They are wrong. In *Strahlendorf*, the court pointed out that section 435 requires a motion to strike under that section to be filed "'within the time allowed'" to file a response to the complaint and the defendant's motion to strike was filed well after that time period. (*Id.* at p. 1913.) The time frames set forth in section 435 do not apply to motions under section 425.16, which has its own time limitations.

Nothing in section 425.16 bars service of the motion after the service of the answer. In fact, case law supports the review of motions to strike even after the answer is filed. (*Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 739-740.)

To the extent defendants are concerned that discovery might have been served between the date they filed their motion and the earliest day they could have served their motion, it is the filing of the motion, not service that triggers the automatic discovery stay. (§ 425.16, subd. (g).) On their filing of the motion on November 24, 2004, the discovery stay would have been in place.

Alternatively, defendants could have filed an ex parte application to move the hearing to a date within 30 days of November 24, 2004. As we stated in *FPPC*, *supra*, 121 Cal.App.4th

at pages 1176-1177, "defendants also made no attempt, citing the mandatory nature of the deadline, to obtain from the court a date within the statutory period. As the trial court here noted, such requests may be granted, even routinely. Such an attempt, if it is itself made in a timely manner but still denied, would also establish, beyond dispute, that the condition of the court's docket was the reason for the failure to hear the anti-SLAPP motion within 30 days after service." The defendants' failure to avail themselves of this simple procedure is fatal to their claim on appeal that the trial court abused its discretion in denying this motion.

DISPOSITION

The order is affirmed. The Hoskins shall recover their costs on appeal. (Cal. Rules of Court, rule 27(a)(2).)

ROBIE, J.

We concur:

NICHOLSON, Acting P.J.

MORRISON, J.